(10)

No. 06-1505 4-11-08

IN THE

Supreme Court of the United States

CLIFFORD B. MEACHAM, *et al.*,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

MARGARET A. CLEMENS
JOHN E. HIGGINS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, N.Y. 14603
(585) 263-1000

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
HEATHER M. ZACHARY
ANTHONY M. DEARDURFF
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 663-6000

JANET R. CARTER
DANIEL C. RICHENTHAL
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, N.Y. 10022
(212) 230-8800

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QUESTIONS PRESENTED

1. Whether, once an employer has articulated a non-age basis for its employment decision in a disparate-impact case under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, the employee bears the burden of persuading the finder of fact that the proffered basis was unreasonable.

2. Whether the judgment below should be affirmed regardless of who bears the burden.

CORPORATE DISCLOSURE STATEMENT

Respondent KAPL, Inc. is a wholly-owned subsidiary of Lockheed Martin Corporation, a publicly-held company. KAPL, Inc., operates the Knolls Atomic Power Laboratory, a facility owned by the United States government.

Respondent Lockheed Martin Corporation is a publicly-held company. State Street Bank and Trust Company, acting in various fiduciary capacities and as trustee, owns 18.6% of Lockheed Martin Corporation's common stock, as reported on a Schedule 13G filed with the SEC. State Street Bank and Trust Company is a wholly-owned subsidiary of State Street Corporation.

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STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions, 29 U.S.C. § 623 (Age Discrimination in Employment Act), 42 U.S.C. § 2000e-2 (Title VII), 29 U.S.C. § 206(d) (Equal Pay Act), 29 C.F.R. § 1625.7(d)-(e) (current and proposed EEOC rules), are reproduced as an appendix to this brief.

STATEMENT

The Age Discrimination in Employment Act ("ADEA") provides that employers may not "limit, segregate, or classify" employees in a way that disadvantages an employee "because of ... age." 29 U.S.C. § 623(a)(2). It also provides that an employer does not violate the ADEA "where the differentiation is based on reasonable factors other than age." *Id.* § 623(f)(1). In *Smith* v. *City of Jackson*, 544 U.S. 228, 240-41 (2005), the Court explained that this "RFOA" clause narrows the scope of disparate-impact liability under the ADEA, "consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment." For this reason, "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Id.* at 241.

The Second Circuit recognized that this is just such a case, holding that petitioners' terminations were based on reasonable factors other than age. Pet. App. 19a. As we explain below, in reaching that conclusion, the Second Circuit properly held that petitioners had the burden of persuasion on that issue. In addition, as in *Smith*, respondents are entitled to judgment as a matter of law regardless of which party should bear the

burden, because the employment practice here was clearly based on reasonable factors other than age.

1. Pursuant to a contract with the Department of Energy ("DOE"), KAPL, Inc. operates the Knolls Atomic Power Laboratory, a federally-owned nuclear research and development facility. KAPL employees work on critical and sensitive projects for the DOE and the United States' Naval Reactors program ("Naval Reactors") involving the development of advanced nuclear-powered propulsion systems for submarines and surface ships, training of Navy personnel who operate those systems, and oversight of those systems' maintenance, repair, refueling, and decommissioning. Pet. App. 37a; Tr. 392-93.

DOE and Naval Reactors fund KAPL's operations and set annual staffing limits for the laboratory. Pet. App. 5a. In the early 1990s, responding to changing priorities occasioned by the end of the Cold War, Naval Reactors instituted numerous changes affecting KAPL. Tr. 4359-60. It terminated certain projects and scaled back others, and it imposed more stringent staffing limits. Tr. 416-17, 583-84, 4359-62; J.A. 125-27. For fiscal year 1996, Naval Reactors required KAPL to reduce its workforce by 108 people. Tr. 327-29; Pet. App. 38a.

At the same time, Naval Reactors assigned KAPL substantial new work, much of which involved cutting-edge technology. Tr. 416-17, 425-26, 433-36, 4362-63; J.A. 126-27. For example, Naval Reactors required KAPL to deliver a new class of advanced nuclear submarines by 2004. Tr. 425-26, 3106-07, 3111-20. The new work included structural analysis of new nuclear reactor components, solid-state physics in semi-conductor materials, software development and programming, computer-based electrical engineering, and digital sig-

nal-based processing technology. Tr. 425-26, 433-34, 3113-19.

Because KAPL's existing workforce lacked sufficient expertise and depth to perform some of this new work, KAPL determined that it needed to hire thirty-five new employees, even after reassigning existing workers. Tr. 313-14, 425-26, 433-36, 469-70, 1356, 3112-21; Pet. App. 5a. Thus, to comply with the Naval Reactors-mandated workforce reductions for fiscal year 1996, KAPL needed to reduce its *existing* workforce by 143 people. Pet. App. 38a.

Previously, KAPL had relied on attrition to reduce its workforce. Tr. 424-25, 583-84. As Naval Reactors terminated and scaled back programs, KAPL attempted to fill open positions with existing employees and limited outside hiring to people with skills critical to the laboratory's work. Tr. 424-25, 429, 431, 512, 1345-46, 3113-15. It also offered early retirement incentives. Tr. 584. These measures proved insufficient to achieve the mandated staffing reduction. Tr. 438, 584-85, 873-74, 1279.

Accordingly, under the DOE's direction and oversight, KAPL developed a comprehensive Workforce Adjustment Plan ("Work Plan"). Tr. 687-88, 873-74, 1279, 1338, 1344-48; C.A. Exhibit Vol. ("E.V.") E214-E240. One element of the Work Plan was a Voluntary Separation Plan, under which non-critical employees with at least twenty years of service were offered $20,000 to terminate their employment voluntarily. Tr. 1345; Pet. App. 38a; E.V. E219. Other elements included reassigning employees to fill open positions and retraining others in skills the laboratory needed going forward. Pet. App. 38a.

The Work Plan also provided that selected layoffs would occur as needed in areas where staffing could not be reduced sufficiently through retraining, skill shifts, or voluntary separations. E.V. E217. When designing this element of the plan, KAPL managers evaluated the practices of other employers that had performed similar layoffs, including IBM, GE, Pepsi-Cola, Ford, Oak Ridge, and Martin Marietta. Tr. 340, 883-86, 1135, 1337, 1347-48, 1402-03, 4089. These companies' best practices guided the development of KAPL's involuntary reduction in force ("RIF") procedures. *Id.* In October 1995, the DOE approved the Work Plan, including the four criteria to be used in the event of a RIF. Tr. 1345-46; E.V. E219.

2. Because the Work Plan's voluntary elements proved insufficient to meet Naval Reactors' staffing limitations, KAPL concluded that a RIF was necessary. Pet. App. 38a-39a. For laboratory sections operating above their staffing allowances, KAPL identified a list of "excess skills." Pet. App. 39a; Tr. 639-40, 872-73, 907-12. This analysis was designed to identify positions that KAPL could eliminate with the least adverse effect on operations. Pet. App. 73a; Tr. 907-10, 1416-17.

After the excess skills were identified, employees with those skills were evaluated by their managers for termination through the RIF process. Pet. App. 73a. Employees were grouped at the section, subsection, or unit level and placed on matrices designed for the RIF. Tr. 795-96, 983-84, 1416-17; Pet. App. 74a; J.A. 99-105. In all, KAPL managers produced twenty-nine matrices, together containing a total of 245 employees. Pet. App. 6a; Tr. 352, 1291.

Each manager completing a matrix gave employees a score from zero to ten (ten being highest) on four

equally-weighted criteria. J.A. 95-103; Pet. App. 39a. First, managers assigned performance scores, calculated by averaging the ratings from the employee's prior two performance appraisals. J.A. 94, 102; Pet. App. 39a.

Second, employees were ranked on their "criticality." J.A. 95, 99. This measured how essential an employee's skills were to the existing and future work of the laboratory. Tr. 1023-24, 1134-35, 1404-05. Written guidelines for the RIF explained that criticality measured such things as: "How critical are the employee's skills to continuing work in the Lab? Is the individual's skill a *key* technical resource for the [] program? Is the skill readily accessible within the Lab or generally available from the external market?" J.A. 95. The guidelines instructed managers to ask such questions as: "Is this employee the sole owner, or one of few, who possess key technical knowledge for the [] program? Is this skill readily accessible in the Lab? Would this skill have to be replaced?" J.A. 102-03. Criticality was particularly important given the changing nature of KAPL's work. Tr. 1023, 1134-35. A particular employee might have a general job description fitting the definition of an excess skill, yet be the *only* employee possessing expertise essential to completion of ongoing tasks required by Naval Reactors. Tr. 984, 1023, 1134-35. By contrast, another employee with the same job description might have knowledge relevant primarily to projects Naval Reactors had terminated or scaled back. Tr. 2727-28, 2753-57, 3032-43, 3180-90, 3211-13, 3326-27.

Third, employees with excess skills were ranked on their "flexibility." J.A. 95, 99. This was a measure of whether the employee possessed—or could readily acquire—skills that might be applied in areas of the labo-

ratory other than the employee's current job. Tr. 1023-24, 1403-04. The written RIF guidelines instructed managers to rate employees on such issues as: "Can his or her documented skills be used in other assignments that will add value to current or future Lab work? Is the employee retrainable for other Lab assignments?" J.A. 95. Managers also were to consider "how adaptable [their employees] are to other work," whether they had "[s]kills beyond those needed in current position," and whether they "exhibit[] willingness to assist other functions/areas within the Lab." J.A. 121. Given Naval Reactors' changing demands, flexibility was important. As KAPL President John Freeh explained in a speech predating the RIF, "As we and the Program decide to stop work in one area and start different work in another area, the nature of the work and the required skills can change significantly.... This means we need people who can make this kind of transition. People who are versatile and motivated to retrain and work in unfamiliar areas[.]" J.A. 126-27.

Fourth, employees were rated on their years of company service. J.A. 95, 102. Managers gave employees between zero points (for less than two years of service) and ten points (for more than twenty years). *Id.*; Pet. App. 40a. Thus, ten of the forty points available in the RIF analysis were based on the employee's tenure at the company. J.A. 95, 102.

Employees' scores for the four criteria were added together. The employees with the lowest rankings on each matrix were identified for layoff. J.A. 96; Pet. App. 6a. In order to minimize the number of terminations, however, managers were instructed to recommend any open positions in the laboratory that the employees might be suited to fill. J.A. 96; Pet. App. 74a.

The four criteria KAPL used in its RIF have been employed by many other companies that have undertaken similar downsizings. Tr. 4092-94, 4102-03. And KAPL took several steps to ensure the consistency and accuracy of its managers' RIF decisions. Tr. 1409-10.

First, KAPL managers—who possessed unique knowledge concerning the needs of their sections and the capabilities of their employees—received extensive training on the entire RIF process. J.A. 117-122; Tr. 984-85, 1027, 1111, 1410-1415, 4090-91, 4100; Pet. App. 16a. All participating managers were required to attend Manager Information Sessions on the RIF procedures and standards. J.A. 117-22; Tr. 1003-04, 1413-15. The training sessions explained in detail how managers were to apply each of the RIF criteria, including flexibility and criticality. J.A. 119, 121; Tr. 1003-04, 1023, 1414-15, 2732-33. KAPL also supplied managers with a comprehensive written guide to the RIF process that provided definitions of the four criteria and explanations of how they should be applied. J.A. 94-116; Tr. 1002-04, 1023.

Second, KAPL required managers making RIF determinations to defend their decisions to a Review Board made up of senior managers. Managers participating in the RIF were required to provide overviews of their sections' structures (including areas of excess skills and open positions), to justify why they included certain employees on their matrices or excluded others, and to defend the scores they gave, including on criticality and flexibility. J.A. 97, 115-16, 122-23; Tr. 487-88, 832-33, 1008-09, 1024, 1111, 1135, 1293, 1410, 1459-60, 2825, 3197, 3374-75, 3715-17.

The Review Board closely scrutinized managers' determinations to ensure that their analyses of excess

skills and applications of the RIF criteria were consistent and accurate. Tr. 487-88, 544-45, 832-33, 1009, 1410, 3481-82, 3715. It reviewed each completed matrix, relying on detailed interviews with managers and reviews of employee personnel files. Tr. 1009, 1113-14, 3716-17, 3720-21. It focused particular attention on the flexibility and criticality ratings. Tr. 1024, 1113-14, 3375, 3716-17. The Review Board instructed some managers to revise their matrices and required them to return for follow-up review sessions. Tr. 1410, 3197-98, 3670-72, 3716-19, 4127. It challenged managers' determinations of which employees had excess skills, and in several cases ordered managers to add employees to their matrices. *Id.*; Tr. 3374-75, 4138.

After the Review Board approved a list of employees for the RIF, KAPL's President continued to seek ways to avoid terminating those employees. Tr. 1411, 4378-81. He held a meeting two days before the RIF to confirm personally that none of the employees was a suitable match for any open position. *Id.* He questioned the managers of employees selected in the RIF and other managers who had open positions, requiring the group to discuss each employee individually. Tr. 4379-80. Ultimately, KAPL's President and the managers concluded that there were no suitable matches. Tr. 4378-79.

Some of the terminated employees scored low on criticality because they had been assigned to projects that Naval Reactors had already terminated or scaled back, and so they had few skills that were critical to the ongoing or future work at the laboratory. Tr. 512-14, 2727-28, 2753-57, 3180-90, 3211-13, 3326-27. Employees in sections where work had dwindled tended to be older because KAPL had not hired anyone to perform those obsolete tasks in years (and sometimes, in more than a

decade). Tr. 512-14. Likewise, a number of the terminated employees scored low on either criticality or flexibility (or both) because they had demonstrated an unwillingness to take on new tasks or learn new skills even though their managers had requested that they do so. Tr. 1621-22, 1831-35, 2087-88, 2098, 2104-05, 2110-13, 3187-90, 3211-13.

For example, Arthur Kaszubski, a manager of transportation and warehouse activities, ignored the recommendations of two different managers who told him he should become computer literate. Tr. 1603, 1621-22. Similarly, William Chabot, a procurement department employee, acknowledged that, even though his manager had told him a layoff was coming and had urged him to develop expertise in regulations concerning foreign-owned or controlled businesses, he failed to develop that expertise. Tr. 1831-35. Chabot also admitted that he was incapable of performing the job duties of the only other employee against whom he was compared on a RIF matrix, and that the other employee was capable of performing all of Chabot's duties. Tr. 1835-37, 1839-40, 1857. And William Reynheer, a test sponsor in the materials-development operation, conceded that he did not have materials-engineering skills and was not computer literate, although both were critical skills in his subsection, and that even though his managers had explained in his performance evaluations that he needed to develop those skills, he had failed to do so. Tr. 2087-88, 2098, 2104-05, 2110-13, 3187-90.

3. Near the end of the RIF process, a KAPL human resources representative performed an assessment to determine whether the RIF would have an adverse age impact. Pet. App. 40a-41a. This analysis was flawed because the representative merely compared

the average age of KAPL's exempt workforce before and after the RIF. Tr. 1895-96. Because that workforce exceeded 2,000 workers, this analysis did not show the RIF's impact on older employees. *Id.*; Pet. App. 17a.

This error was of no consequence, however, because KAPL soon recognized that most of the employees identified for termination were over forty. Tr. 825, 1285, 1287, 1421-22, 1425-27. In fact, KAPL's general counsel and other managers expressed concern that KAPL might face an age discrimination lawsuit if KAPL went forward with the RIF. Tr. 1423, 1425-27, 1587. The general counsel carefully considered this possibility in an independent review of the RIF process: he analyzed the matrices to ensure that they included the correct employees based on the definitions of excess skills; he reviewed employees' personnel folders to ensure that their performance ratings were accurate; and he spoke with some of the employees' managers and with human resources representatives to confirm that there were legitimate, non-discriminatory reasons for the selections. Tr. 1286-89, 1290-91, 1300, 1406-07, 1415-19, 1423. He also sought to determine whether criticality and flexibility were applied in a consistent way across matrices. Tr. 1405-07. Together with several managers, KAPL's general counsel concluded that the determinations had been properly made, were based on reasonable non-age factors, and did not violate the ADEA. Tr. 1289, 1419-27.

The general counsel also determined that any effort to ameliorate further the RIF's impact on older workers by selecting younger workers for termination instead would have placed KAPL in an untenable legal position. The New York Human Rights Law prohibits age discrimination against any employee eighteen

years of age or older. Tr. 1423-27. Thus, if KAPL had purposefully selected employees under forty for termination to avoid an ADEA suit, it might have faced a lawsuit under state law contending that KAPL had intentionally discriminated against those younger employees because of their ages. Tr. 1425, 1427; *see also Deutsch* v. *Kroll Assocs., Inc.*, No. 02 Civ. 2892, 2003 WL 22203740 (S.D.N.Y. Sept. 23, 2003) (reverse-age-discrimination claim brought by younger worker). Accordingly, KAPL's general counsel recommended that the company proceed with what he determined were the fair and legitimate termination selections of KAPL's managers and Review Board. Tr. 1425-27. On December 6, 1995, KAPL informed thirty-one exempt employees that they would be terminated. Pet. App. 74a.

4. In January 1997, twenty-eight of the terminated employees sued, contending that they had been discriminated against because of their ages. They raised both disparate-treatment and disparate-impact claims. Pet. App. 43a.

In pressing their disparate-impact claims at trial, petitioners did not expressly identify any specific element of the RIF as constituting an unlawful employment practice. Instead, petitioners' claims were premised on the arguments that (i) the *entire RIF* had a disparate impact on older employees and, (ii) because KAPL could serve its business objectives without resorting to involuntary layoffs, the ADEA required KAPL to adopt an alternative to the RIF.[1] Tr. 4413,

[1] Respondents argued that petitioners' identification of the RIF as a whole was insufficient to satisfy the *Wards Cove* requirement that a plaintiff isolate and identify the specific employ-

4416-17, 4428-31, 4434-36, 4597, 4599-604, 4634-37; Mem. in Opp. to J.M.O.L., New Trial, or Remittitur, 11-13, 19-21 ("JMOL Opp."). Specifically, at step one of the framework drawn from *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), petitioners argued that the RIF *as a whole* had a statistical adverse impact on employees aged forty and older. Tr. 4428-29, 4597-99.

At step two, respondents rebutted petitioners' prima facie case by offering a facially legitimate business justification for the challenged practice. Pet. App. 59a. Respondents explained that the RIF was necessary to enable KAPL to comply with Naval Reactors-mandated staffing reductions, while at the same time ensuring that the laboratory's employees possessed those skills critical to the performance of KAPL's existing and future functions. Pet. App. 59a, 94a.

At the third step of the *Wards Cove* analysis, petitioners sought to demonstrate that there were alternatives to the RIF that would not have had an adverse impact on older workers, but that would have been equally effective in serving respondents' business goals. Tr. 4430-31, 4599-604, 4634-37; JMOL Opp. 20-21. Again, because the employment practice that petitioners challenged was the RIF itself, and not particular aspects of the RIF, petitioners did not claim at step three that KAPL should have designed the RIF more carefully. Tr. 4430-31. Rather, petitioners argued that, *instead of performing the RIF*, KAPL should have instituted a hiring freeze or expanded the scope of the Voluntary Separation Plan ("VSP"). *Id.*; Tr. 4600-04, 4634-37; Pet. App. 97a-98a. Respondents countered

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ment practices that are allegedly responsible for any observed statistical disparities. *See, e.g.*, Tr. 4413-14.

this argument by offering evidence that neither of these options would have been equally effective at meeting the business justifications KAPL offered at step two. Pet. App. 97a-98a; Tr. 429-37, 473-74, 537-41, 1399-1400, 2588, 3117-20; Post-Trial Mem. in Supp. of Mot. for J.M.O.L., New Trial, and/or Remittitur 22.

Respondents also presented evidence justifying their use of the RIF criteria. Tr. 4092-4104; Pet. App. 16a. Through the testimony of their expert Frank Landy, respondents demonstrated that the criteria KAPL used to select employees for termination were reasonable and typically employed in RIFs. Tr. 4093. Landy also testified that KAPL's training equipped managers well to apply the RIF criteria. Tr. 4090-91. Petitioners chose not to cross-examine Landy. Tr. 4116.

5. The jury found for respondents on all of the original plaintiffs' disparate-treatment claims under both mixed-motive and pretext theories. J.A. 62-64, 69-71. The jury thus determined that petitioners had failed to prove that age had been a motivating factor in their terminations. It found for petitioners, however, on their disparate-impact claims, applying instructions that set out the three steps of *Wards Cove*. Tr. 4731-36. On a special verdict form, the jury indicated that petitioners had made their prima facie statistical showing at *Wards Cove* step one; that respondents had not produced evidence of a business justification at step two; and—despite being told to skip the third step if they found the previous one not satisfied—that petitioners had proven an equally effective alternate practice at step three. J.A. 73-74.

6. Respondents moved for judgment as a matter of law, which the district court denied. At the first

Wards Cove step, the court recognized that petitioners were required to identify a specific employment practice that had an adverse impact on older employees. Pet. App. 83a. It concluded that the practice identified by petitioners—the implementation of the RIF itself—was not sufficiently specific, but nevertheless fell into an exception for decision-making processes that "are not capable of separation for analysis." Pet. App. 83a-85a (citation omitted). That was so, the court held, because even though three of the RIF criteria—performance, criticality, and flexibility—were reached through the application of "objective standards," petitioners' statistical evidence "sufficed to establish that no particular factor and no particular criterion caused the disparate impact on older employees." Pet. App. 84a-85a & n.26.

The court rejected the jury's finding at *Wards Cove*'s second step, and held that respondents *had* produced evidence of a business justification. Pet. App. 93a-95a. Nevertheless, it deemed the error harmless, because the jury had gone on to answer the third-step question, and, the court found, sufficient evidence supported the jury's conclusion: "[P]laintiffs offered evidence from which the jury could find that either of two alternative practices were available to defendants to achieve the same result without causing a disparate impact on older employees"—"institut[ing] a temporary hiring freeze" or "offer[ing] the VSP to a greater number of employees." Pet. App. 96a-97a.

7. The Second Circuit affirmed, but on a different basis from that adopted by the district court. Contrary to the district court's view, the Second Circuit held that the RIF itself was not a sufficiently specific employment practice to satisfy *Wards Cove*'s first step. Pet. App. 58a. Nevertheless, it relied on a single answer

given by petitioners' expert to conclude that "the jury could have found ... the degree of subjective decision making allowed in the [RIF] created the disparity"—even though petitioners themselves never made that argument to the jury (or indeed to the Second Circuit). Pet. App. 59a.

The court of appeals agreed with the district court that respondents had adduced evidence of a business justification—the need "to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions." *Id.* And it rejected the alternatives the district court thought adequate to satisfy petitioners' burden under *Wards Cove* step three—expanding the VSP or instituting a hiring freeze—because those were alternatives to the RIF itself, not to the specific employment practice of "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility.' " Pet. App. 60a. But the court nevertheless concluded that petitioners prevailed at step three, because, it believed, KAPL "did nothing to audit or validate the results," and "KAPL could have designed [a RIF] with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias." *Id.*

Respondents petitioned for certiorari, and this Court granted the petition, vacated the judgment, and remanded for further consideration in light of *Smith* v. *City of Jackson*, 544 U.S. 228 (2005). *See* 544 U.S. 957 (2005).

8. On remand, the Second Circuit concluded that its prior decision did not survive *Smith*, vacated the district court's judgment, and remanded with instructions to enter judgment for respondents. Pet. App. 5a.

It concluded that its prior analysis was "untenable" because in *Smith*

> the Supreme Court held that the "business necessity" test is not applicable in the ADEA context; rather, the appropriate test is for "reasonableness," such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals.

Pet. App. 9a. The court next determined that plaintiffs should bear the burden of persuading the fact-finder that the employer's justification is unreasonable. Pet. App. 11a. It observed that *Smith* made clear that the scope of liability under the ADEA is narrower than under Title VII, and that result is justified because " 'age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment' "; thus, " 'certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group.' It would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable." Pet. App. 12a-13a (quoting *Smith*, 544 U.S. at 240-41).

Turning to the application of the post-*Smith* framework, the court found that respondents had satisfied their burden of production by adducing evidence "suggest[ing] that the specific features of the [RIF] challenged by plaintiffs were routinely-used components of personnel decisionmaking systems in general, and were appropriate to the circumstances that provoked KAPL's [RIF]." Pet. App. 16a. The court then

examined whether petitioners satisfied their burden of demonstrating that this justification was unreasonable. Cautioning that a court is "not a super-personnel department," *id.* (citation omitted), it reviewed the evidence regarding the planning, conduct, and review of the RIF, and concluded that the process involved "substantial" measures that "restricted arbitrary decision-making by individual managers." Pet. App. 19a. Overall, the court concluded that, while other reasonable means could have been employed, " 'the one selected was not unreasonable.' " *Id.* (quoting *Smith*, 544 U.S. at 243).

Judge Pooler dissented. In her view, the three steps of *Wards Cove* remain unchanged after *Smith*, and RFOA constitutes a separate, affirmative defense on which employers have the burden of proof, Pet. App. 24a-25a—an argument petitioners never pressed.

SUMMARY OF ARGUMENT

This case concerns the appropriate test for establishing age discrimination under a disparate-impact theory. In the wake of *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), the Second Circuit applied a modified *Wards Cove* burden-shifting framework under which a "reasonableness" test replaces "business necessity." Thus, after the plaintiff makes a prima facie showing of a statistical age impact, and the employer responds with a non-age basis for its action, the plaintiff must prove that the proffered justification was unreasonable. By doing so, the plaintiff proves that the decision was indeed "because of ... age" and not based on "reasonable factors other than age." 29 U.S.C. §§ 623(a)(2), (f)(1).

This test gives proper effect to two crucial differences between age and Title VII-protected characteristics that this Court identified in *Smith*. Age frequently correlates negatively with capacities on which an employer may legitimately focus its decisionmaking, and historically has not been the subject of invidious discrimination. Accordingly, a statistical adverse impact has less probative value in age cases than under Title VII—it simply is less likely to have resulted from discrimination. To make up for that lesser probative value, the remainder of the plaintiff's case must prove more than would be sufficient to make out Title VII discrimination. Assigning plaintiffs the task of proving unreasonableness does just that.

The differing approaches proposed by petitioners and the government each suffer from serious flaws. Petitioners would require the parties, the jury, and the court to navigate a convoluted, four-step inquiry that disregards the need to modify the *Wards Cove* ap-

proach to take account of the fact that age is different from the categories under Title VII. The government recognizes that petitioners' approach is incorrect, but its own requires even less of a plaintiff, demanding nothing beyond the prima facie case. Both insist that RFOA is available as an affirmative defense that the defendant must separately prove, but this cannot solve the inadequacy of their accounts of the plaintiff's case-in-chief.

Petitioners argue that their result is nevertheless compelled by the text and structure of the ADEA, by an EEOC interpretive rule, and by parallels to other statutes. None of these arguments has merit. Petitioners' overly mechanical reading of the statute is at odds with the functional approach this Court took in deciding that another part of Section 623(f) was *not* an affirmative defense. Their textual argument fails to give effect to every word in the statute, and the text of the EEOC rule on which they rely is inconsistent with their position. In addition, their attempts to analogize to other provisions in the ADEA and in the Equal Pay Act fail to appreciate the very different functions those provisions play within their respective statutes, and their reliance on post-enactment legislative history is *ipso facto* unconvincing.

This Court should therefore hold that plaintiffs bear the burden of persuasion on RFOA. But even if it does not, the Court should affirm the judgment of the Second Circuit, because respondents produced substantial and unrebutted evidence that the factors on which they based their decision were reasonable. In that way, this case is just like *Smith*, in which this Court affirmed summary judgment on the ground that the non-age factors considered by the employer were reasonable as a matter of law.

ARGUMENT

I. Disparate Impact Plaintiffs Bear The Burden Of Persuading The Jury That The Factors Forming The Basis Of An Employment Decision Were Unreasonable

A. Placing The Burden Of Persuasion On Plaintiffs Is The Only Workable Approach

Three proposed tests for ADEA disparate-impact claims are before this Court. Petitioners advocate applying the *Wards Cove* business-necessity test, and requiring in addition that employers prove RFOA as a separate affirmative defense. The government argues that reasonableness has replaced business necessity, but asserts that a plaintiff's case consists merely of offering statistics showing an impact on older workers. Neither proposal properly accounts for the limited probative value of a statistical age impact. Only the Second Circuit's approach—requiring plaintiffs to prove that the factors on which a decision was based were unreasonable—does so.

1. A modified *Wards Cove* test in which reasonableness replaces business necessity gives proper effect to the RFOA provision and comports with *Smith*

As the Second Circuit explained, *Smith* made clear that "the 'business necessity' test is *not* applicable in the ADEA context." Pet. App. 9a (emphasis added). Rather, "the appropriate test is for 'reasonableness,' such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals." *Id.* The Second Circuit incorporated this different standard into a three-step burden shifting framework akin to *Wards*

Cove: After plaintiffs isolate a specific employment practice and a statistically significant adverse impact resulting therefrom, the defendant must produce evidence of a justification for the challenged practice, and then the burden shifts back to the plaintiffs "to demonstrate that *that* justification is unreasonable." *Id.* at 15a.

The Second Circuit's recognition that the business-necessity test should not govern ADEA claims properly accounts for two fundamental ways in which age differs from Title VII's categories. First, "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment." *Smith*, 544 U.S. at 240. Second, "intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII." *Id.* at 241; *see also Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

Given these differences, the permissible inferences to be drawn from a statistically significant adverse impact differ markedly between age and Title VII-protected characteristics. Race, religion, sex, and the other Title VII categories generally do not correlate with an individual's job-related capabilities. *See Smith*, 544 U.S. at 240; Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (June 1965), *reprinted in* U.S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* (1981), Doc. No. 5, at 1 ("Wirtz Report") ("The Nation has faced the fact ... that people's ability and usefulness is unrelated to the facts of their race, or color, or religion,

or sex, or the geography of their birth.").[2] Accordingly, and in light of the long history of discrimination Title VII was enacted to combat, an employment practice that yields a statistically significant adverse impact on minorities or women is immediately suspect.

A practice that yields a statistical disparate impact on older workers, by contrast, is far less suspect. Age—unlike race, religion, and the other Title VII classifications—is often relevant to certain employment-related capabilities. *See Smith*, 544 U.S. at 240. Decisions that focus on such capabilities should be *expected* to correlate negatively with age. This Court has noted, for example, that "physical ability generally declines with age," *Massachusetts Bd. Of Ret.* v. *Murgia*, 427 U.S. 307, 315, (1976), and that "mental capacity sometimes diminish[es] with age," *Gregory* v. *Ashcroft*, 501 U.S. 452, 472 (1991). The Wirtz Report recognized that a class of cases exists in which "there is in fact a relationship between [an individual's] age and his ability to perform the job." Wirtz Report 2 (emphasis omitted). Moreover, "human capital depreciates[,] due not only to a literal wearing out, as by memory loss or diminished dexterity[,] but also to a changing work environment, which reduces the value of particular knowledge or skills." Richard A. Posner, *Aging and Old Age* 51-53 (1995).

An employment practice yielding a statistical adverse impact on older workers therefore warrants less suspicion, and accordingly a less exacting justification,

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[2] The Secretary of Labor prepared this report in response to Congress' request for a study of age discrimination in employment, and this Court considered it in construing provisions of the ADEA in *Smith*. *See* 544 U.S. at 232.

than one that has an adverse impact on a Title VII-protected characteristic. Reexamining the *Wards Cove* framework with that point in mind, two consequences emerge.

First, under *Wards Cove*, a prima facie showing of a statistical adverse impact on nonwhite workers was insufficient to establish that a particular employee had suffered a disadvantage "because of" race. *See* 490 U.S. at 660 ("The persuasion burden [regarding business necessity] ... must remain with the plaintiff, for it is he who must prove that it was 'because of such individual's race, color,' etc., that he was denied a desired employment opportunity." (quoting 42 U.S.C. § 2000e-2(a)). *A fortiori*, a statistically significant adverse impact on older workers cannot establish that a particular employee has suffered a disadvantage "because of" age.

Second, under *Wards Cove*, a plaintiff could show that a disadvantage was "because of" race by rebutting the defendant's business justification with evidence that another means would have achieved that same business result without an adverse impact. *See* 490 U.S. at 660-61. But because the probative value of the prima facie case in the age context is weaker, the remaining steps in the analysis must do more work than in a Title VII case. Thus, even though satisfying the remainder of the *Wards Cove* test is sufficient to confirm that a plaintiff suffered an employment disadvantage "because of" a trait protected under Title VII, it does not follow that satisfying that test is sufficient to carry the heavier burden needed to confirm that an older worker suffered a disadvantage "because of" age.

The Second Circuit's test properly takes account of these differences between age and the Title VII categories. It places a higher burden on plaintiffs by re-

quiring them to show that the challenged employment action was not just unnecessary, but unreasonable. In so doing, it responds to the lower probative value of a statistical adverse impact on older workers. And where a plaintiff rules out the proffered factors "other than age" as unreasonable, the plaintiff will have demonstrated that the employment disadvantage was "because of" age.

In sum, replacing business necessity in the *Wards Cove* framework with reasonableness produces a straightforward and intuitive test responsive to the unique features of age and consistent with *Smith*'s instruction, 544 U.S. at 240, that "the scope of disparate-impact liability under ADEA is narrower than under Title VII."

2. Petitioners' approach fails to account for the differences between age and traits protected by Title VII and involves an unnecessarily convoluted analysis

Petitioners argue that *Wards Cove*'s business-necessity test should be applied, unmodified, to establish disparate impact under the ADEA. RFOA, they maintain, is a separate and waivable affirmative defense that the employer must both plead and prove. Their proposal yields a convoluted test insensitive to the distinct nature of age in employment.

a. Petitioners' approach is insufficient to establish that a plaintiff suffered an adverse action "because of" age

There is no dispute that a plaintiff bears the ultimate burden of persuading the jury that the defendant's actions constituted "limit[ing], segregat[ing], or classify[ing]" employees in a way that disadvantaged

the plaintiff "*because of* ... age." 29 U.S.C. § 623(a)(2) (emphasis added). As explained above, the fact that an employment practice has a statistical adverse impact on older workers is much less probative than would be true of an adverse impact on employees of a certain race, religion, or other Title VII-protected category. Thus, an age-discrimination plaintiff who merely satisfies the three steps of an unmodified *Wards Cove* framework does not thereby establish adverse action "because of" age.

Petitioners make no effort to address this issue. They simply assert that satisfying *Wards Cove*'s three steps is sufficient to establish "unlawful" action under the ADEA, and claim that *Smith* so held. As petitioners tell it, this Court "explained that whether an employment practice is 'otherwise prohibited' because of its unlawful disparate impact is determined on the basis of '*Wards Cove*'s pre-1991 interpretation of Title VII's identical language.' " Pet. Br. 46-47 (quoting *Smith*, 544 U.S. at 240).

Petitioners misread *Smith*, which simply deemed "applicable to the ADEA" *Wards Cove*'s interpretation of Title VII's "identical language." 544 U.S. at 240. Moreover, the Court made that statement while explaining that the 1991 amendments that had "expanded the coverage of Title VII" did not apply to the ADEA. *Id.* The function of the pertinent amendments was to reassign the ultimate burden of persuasion to employers. *See* 42 U.S.C. § 2000e-2(k), *added by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1074. Thus, the sentence in *Smith* on which petitioners rely so heavily does not support their argument. Rather, that sentence is properly understood as making clear that *Wards Cove*'s interpretation of "because of"—as requiring that "[t]he persuasion burden ... must remain

with the plaintiff," 490 U.S. at 660—remains applicable to the ADEA. After all, "because of" appears in both statutes, but "business necessity" does not.

Even if the "remains applicable" sentence in *Smith* might be read more broadly, moreover, it cannot be taken as far as petitioners claim. The existence of RFOA in the ADEA renders the pertinent portions of the two statutes non-identical, and petitioners cannot insist that RFOA has no bearing on the applicability of the business-necessity test without assuming their own conclusion.

b. Petitioners' proposal is unworkably complex and functionally at odds with RFOA

Petitioners' approach to disparate-impact cases under the ADEA would be needlessly complex. After applying the already complicated three-step burden-shifting framework of *Wards Cove*, the jury would then have to consider a fourth step that would ask whether the practice they had already found to be discriminatory nevertheless was based on non-age factors that were "reasonable." That framework would be very difficult for a jury to understand; as the Second Circuit observed, doing so would "introduc[e] a redundant (and counterintuitive) step in the analysis." Pet. App. 10a n.5. Indeed, the government agrees that the ADEA "provides no textual basis for asking *both* whether a challenged employment practice is supported by business justification *and* whether it is based on reasonable factors other than age." U.S. Br. 26.

Petitioners respond that "nothing prevents an employer from pretermitting the full analysis by establishing at the outset that it has a reasonable basis for the challenged employment practice," as this Court did in

Smith. Pet. Br. 48 n.31. Although that may be a suitable mode for appellate review, it is unclear how it could function in a set of jury instructions; and it is hardly a reassuring defense of the workability of a four-step analysis to say that steps two and three might be redundant of the fourth.

In addition, the government identifies a more fundamental incompatibility between RFOA and business necessity. A plaintiff who successfully navigates the third step of the business-necessity test "prove[s] that '[the employer was] using [its] tests merely as a "pretext" for discrimination.'" *Wards Cove*, 490 U.S. at 660 (citation omitted). And once a disparate impact plaintiff has "established that a challenged practice is a pretext for intentional age discrimination, it makes little sense then to ask whether the discriminatory practice is based on reasonable factors *other than age*." U.S. Br. 26.[3]

In sum, petitioners' proposed test is both analytically deficient and unworkable. It would apply a standard created for Title VII cases to the ADEA in disregard of the limited probative significance of a statistical age impact. And in relegating RFOA to an affirmative defense, it yields a four-step test that is at best cumbersome and counterintuitive, and at worst incoherent.

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[3] The government implies, moreover, that the effect of petitioners' interpretation would be to leave the RFOA provision with little function in the ADEA. *See* U.S. Br. 26. *Smith* established that impact claims are where the RFOA "plays its principal role." 544 U.S. at 238-39. If petitioners' view were correct, RFOA's "principal role" would be no role at all.

3. The approach suggested by the government relieves plaintiffs of the burden of proving discrimination

The government acknowledges that, after *Smith*, the business-necessity test is inapplicable to ADEA disparate-impact claims. *See* U.S. Br. 25-26. For such claims, "the RFOA defense replaces, rather than supplements, the business necessity test applicable in Title VII cases." *Id.* at 25.

Nevertheless, the government maintains that the employer should bear the burden of persuasion on RFOA. *See* U.S. Br. 10-25. But given its view that neither business necessity nor RFOA forms part of the plaintiff's case, the government must explain what a plaintiff needs to show to establish a violation of Section 623(a)(2). That explanation seems simply to be step one of *Wards Cove*: "plaintiffs [must] demonstrate[] that a specific employment practice has a significant disparate impact on older workers—that is, that the employer has 'limit[ed], segregat[ed], or classif[ied] his employees in [a] way which ... adversely affect[s an individual's] status as an employee, because of such individual's age.'" *Id.* at 26-27 (quoting § 623(a)(2)).

That cannot be correct. *Wards Cove* made clear that a Title VII plaintiff had not shown that the employer took some action "because of" a prohibited characteristic until the plaintiff carried the ultimate burden of persuasion—by rebutting the defendant's claimed business justification. *See* 490 U.S. at 660; *cf. Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 995 (1988) (plurality opinion) ("statistical disparities must be sufficiently substantial that they raise ... an *inference* of causation" in the prima facie case (emphasis added)).

As demonstrated above, the same reasoning applies *a fortiori* to age.

The government's approach, moreover, is hard to square with the fact that "the scope of disparate-impact liability under ADEA is narrower than under Title VII." *Smith*, 544 U.S. at 240.[4] It would impose on a defendant a burden much greater than was borne under *Wards Cove*, as it adds to the burden of production the further burden to persuade the jury that the factors on which the decision was based were reasonable. Although reasonableness is a more favorable standard than business necessity, that is unlikely to make up for the disadvantage of the burden. *Cf. Lavine* v. *Milne*, 424 U.S. 577, 585 (1976) ("Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive[.]").

The Second Circuit's approach is the only one that accords with this Court's precedents and the statutory text. The tests proposed by petitioners and the government both fail to account for the differences between age and characteristics protected by Title VII, and petitioners' test has fatal practical flaws.

B. Petitioners' Remaining Arguments Cannot Overcome The Deficiencies In Their Approach

Rather than addressing the practical and analytical problems with their proposed test, petitioners argue that treating RFOA as an affirmative defense is compelled by the statutory structure and text, an EEOC

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[4] Because the Court identified RFOA and the 1991 amendments to Title VII as *separate* reasons for ADEA's narrower scope, ADEA liability must be narrower than Title VII liability as it existed under *Wards Cove*.

interpretive rule, and analogies to other statutory provisions. None of their arguments has merit.

1. The statutory structure and text do not support petitioners' view

Petitioners ground their argument in a mechanical reading of the statute. According to them, Congress set out the ADEA's substantive prohibitions in Section 623(a) and its affirmative defenses in Section 623(f). Pet. Br 22 ("Subsection (f) ... contains 'the ADEA's five affirmative defenses' " (quoting *TWA, Inc.* v. *Thurston*, 469 U.S. 111, 122 (1985))). Petitioners argue, further, that Congress' choice of the articulation "otherwise prohibited" indicates that what follows—including RFOA—are affirmative defenses. Pet. Br. 23. These arguments are wide of the mark.

1. The structure of the statute cannot bear the weight petitioners assign it. In *Public Employees Retirement System* v. *Betts*, 492 U.S. 158 (1989), the plaintiff raised similar arguments, arguing that Section 623(f) set out "the ADEA's narrow defenses," and therefore, the employee-benefit plan provision of Section 623(f)(2) was an affirmative defense. Brief for Appellee, No. 88-389, at 5, 8 (citing *TWA*, 469 U.S. at 121-22). This Court refused to analyze the statute mechanically, examining instead what the ADEA sought to regulate and Section 623(f)(2)'s function within that framework. *See* 492 U.S. at 176-78. That analysis led the Court to conclude that Section 623(f)(2) "is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context.... It redefines the elements of a plaintiff's prima facie case instead of establishing a defense to what otherwise would be a violation of the [ADEA]," and, accordingly,

"the employee bears the burden of proving" its applicability. *Id.* at 181.

In light of *Betts*, the mere fact that the provisions of Section 623(f) are set apart from the primary prohibitions in Section 623(a) does not warrant treating them as affirmative defenses. Instead, the analysis should focus on each provision's role within the statute. Like the provision under review in *Betts*, the RFOA provision functions not to define an affirmative defense but to clarify the scope of prohibited conduct.[5]

2. Petitioners also argue that the Court's indication that the ADEA's provision for *bona fide* occupational qualifications (BFOQ) is an affirmative defense should be extended to RFOA, given that the two provisions appear alongside each other. Pet. Br. 27-28. This disregards the very different roles the two provisions play in the statute. BFOQ is principally, if not exclusively, a defense to disparate-treatment claims. It applies when age is *concededly* part of the employer's decisionmaking; that is, the employer acknowledges that its decision was age-based, but seeks to justify the decision on the ground that age is a "qualification" for the

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[5] In light of *Betts*, this Court's prior shorthand reference to "the ADEA's five affirmative defenses," *TWA, Inc.* v. *Thurston*, 469 U.S. 111, 122 (1985), should be given little weight. In any event, whether a provision is titled an "affirmative defense" does not resolve the ultimate question—that is, which party bears the burden of persuasion. For example, this Court referred to business necessity in *Wards Cove* as a "defense" and assigned the burden of persuasion to plaintiffs. 490 U.S. at 660. Indeed, it is not unusual in the discrimination context to divide burdens between parties, and doing so "conforms with the usual method for allocating persuasion and production burdens in the federal courts [under] Fed. R. Evid. 301." *Id.* at 659-60.

job that is "reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). Given that the ADEA's principal purpose is to restrict the use of age as a factor influencing employment decisions, it makes sense to require employers affirmatively to justify their use of age as an *explicit* factor under the BFOQ provision.

In a disparate-impact case, by contrast, "the allegedly 'otherwise prohibited' activity is not based on age," and it is here that "the RFOA provision plays its principal role." *Smith*, 544 U.S. at 239 (plurality opinion). The employer predicates its decision not on age but on facially neutral factors; and such neutral factors may well be entirely legitimate even if they correlate with age. *See id.* at 240-41. In that circumstance, requiring the plaintiff to demonstrate that use of those factors was unreasonable is simply consistent with the requirement that the plaintiff sustain the burden of proving that the disadvantage suffered was "because of ... age." In light of their very different functions, interpreting RFOA and BFOQ *in pari materia* is not warranted.[6]

3. Petitioners also rely on the phrase "otherwise prohibited," claiming that the provisions that follow, including RFOA, are therefore "defenses" to "pre-

[6] Also included within Section 623(f)(1) are actions taken where the employee's workplace is in a foreign country and complying with the ADEA's provisions would cause the employer to violate that country's laws. Petitioners cite an EEOC Policy Guidance suggesting, without explanation, that the employer should prove that compliance would violate foreign law. Pet. Br. 28. This provision is different again from RFOA—it involves conduct that by hypothesis violates the ADEA—and so again, interpretation *in pari materia* is not warranted.

sumptively illegal" conduct. Pet. Br. 20. This interpretation, however, would read the word "otherwise" out of the statute. The text dictates that it "shall not be unlawful ... to take any action otherwise prohibited *under subsections (a), (b), (c), or (e)* of this section" where the differentiation is based on RFOA. Thus, "otherwise" prohibited cannot mean prohibited "under other statutory provisions," because that role is played by the language that follows immediately after—"under subsections (a), (b), (c), or (e)." Petitioners' textual argument might be tenable if Congress had decreed that "it shall not be unlawful ... to take any action prohibited under subsections (a), (b), (c), or (e) of this section ... where the differentiation is based on reasonable factors other than age." But Congress did not do so; it inserted the word "otherwise," and "otherwise" must be given some meaning. *See Moskal* v. *United States*, 498 U.S. 103, 109 (1990) (court should "give effect, if possible, to every clause and word of a statute").[7] Accordingly, this formalistic textual argument is no more successful than petitioners' mechanical reading of the statute's structure.[8]

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[7] An obvious alternative is to construe the phrase as shorthand for "that otherwise would be prohibited."

[8] Moreover, if Congress had wanted to designate the provisions of Section 623(f)(1) affirmative defenses, far clearer means were available. *See, e.g.*, 15 U.S.C. § 1681g(e)(10) ("it is an affirmative defense"); 47 U.S.C. § 227(c)(5) ("[i]t shall be an affirmative defense").

2. Familiar burdens-assignment principles favor placing the burden of persuasion on plaintiffs

The ADEA is silent on which party bears the RFOA burden of persuasion. Petitioners and their amici nevertheless argue that "traditional policy rationales for distributing burdens" require that RFOA be construed as an affirmative defense. Pet. Br. 33; U.S. Br. 12. They rely on only one such traditional rationale—the principle that a party with access to information relevant to the matter should bear the burden. *See* Pet. Br. 33. Even were that a complete account—and it is not—it would not support petitioners' conclusion.

Access to information is "not the only consideration" in allocating the burden of persuasion "and it is by no means controlling." Fleming James, Jr., *Burdens of Proof*, 47 Va. L. Rev. 51, 60 (1961); *see also* 2 *McCormick on Evidence* § 337, at 475 (6th ed. 2006) ("Very often one must plead and prove matters as to which his adversary has superior access to the proof.") At least as important is "the extent to which a party's contention departs from what would be expected in the light of ordinary human experience. It is a matter of convenience to assume that things occurred as they usually do and to make the party who asserts the uncommon occurrence prove that it did happen as he claims." James, 47 Va. L. Rev. at 60; *see also* 2 *McCormick on Evidence* § 337, at 475-76.[9] That consideration cuts compellingly

[9] This Court has relied on both rationales in employment discrimination cases. *See, e.g., International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 359 n.45 (1977) ("Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access

in favor of assigning to the plaintiff the burden to disprove reasonableness. Because age frequently will correlate with factors on which an employer reasonably may base an employment decision, it should come as no surprise that age-neutral employment practices will often adversely impact older employees. A statistical adverse impact on older workers does not, by itself, reliably indicate that a particular individual suffered a disadvantage "because of" age and demand an explanation from the employer as to why that is not the case. Thus, it is entirely appropriate to require the employee to prove that the challenged practice is *unreasonable*; only then may the employee fairly be said to have demonstrated that the disadvantage was "because of" age.

By itself, moreover, the access-to-information consideration is insufficient to assign the burden of persuasion on reasonableness to employers. There is no question that the employer should bear the burden of *producing* evidence that factors other than age justified the challenged employment decision. Nonetheless, the issue as to which plaintiffs will bear the burden—reasonableness of the stated factors in light of the stated goals—is an inquiry addressed to common sense and judgment, and not one of factual investigation. And even if that were not so, plaintiffs certainly have no lesser access to evidence of reasonableness than to evidence of business necessity; yet it is well settled that plaintiffs bear that burden under *Wards Cove*. In any event, "liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims." *Wards Cove*, 490 U.S. at 657.

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to the proof." (citing *McCormick on Evidence* §§ 337, 343 (2d ed. 1972); James, 47 Va. L. Rev. at 61).

3. The EEOC's interpretation of the RFOA clause warrants no deference

Petitioners urge the Court to defer to 29 C.F.R. § 1625.7(e), an interpretive rule they assert requires respondents to prove that petitioners' terminations were based on reasonable factors other than age. But by its terms, Section 1625.7(e) applies only to disparate *treatment* claims and imposes merely a burden of production on employers. In fact, the EEOC recently proposed changes to the rule that make clear that its existing text is inconsistent with petitioners' reading. Moreover, the Court need not defer to the EEOC's *interpretation* of Section 1625.7(e) as encompassing disparate-impact claims and imposing a burden of persuasion on employers, because that interpretation conflicts with the plain text of the rule. In any event, even if the EEOC's substantive position concerning the burden of proof were entitled to a degree of respect under *Skidmore*, it lacks the power to persuade here.

a. Section 1625.7(e) does not apply to disparate-impact claims and does not impose a burden of persuasion

The plain language of Section 1625.7(e) makes clear that it does not apply to disparate-impact claims: "When the exception of 'a reasonable factor other than age' is raised against *an individual claim* of *discriminatory treatment*, the employer bears the burden of showing that the 'reasonable factor other than age' exists factually." (emphasis added). The terms "individual claim" and "discriminatory treatment" fairly encompass individual claims of disparate treatment, such as refusal to hire on the basis of age. They do not describe disparate-impact claims, which address the adverse effects of a facially neutral employment practice

on a protected *class* of employees, *see Wards Cove*, 490 U.S. at 657.

The EEOC appears to have recognized this. In a recent notice of proposed rulemaking, it proposes deleting from Section 1625.7(e) the phrase "against an individual claim of discriminatory treatment." 73 Fed. Reg. 16,807, 16,809 (Mar. 31, 2008). The revised rule is intended to apply to both disparate-impact and disparate-treatment claims. *Id.* at 16,808.

Petitioners' contention that the existing rule already serves that purpose both contravenes the unambiguous language of Section 1625.7(e) and fails adequately to account for subsection (d) of the same rule—the subsection that *does* address disparate-impact claims:

> (d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity[.]

29 C.F.R. § 1625.7(d). Adopted at the same time as subsection (e), subsection (d)—which all agree is invalid and has no application here—plainly is directed at disparate-impact claims. 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981); *see also* 70 Fed. Reg. 65,360, 65,361 (Oct. 31, 2005) (subsection 1625.7(d) is a "regulation on disparate impact").[10]

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[10] The EEOC acknowledges that Section 1625.7(d) is inconsistent with *Smith* and must be revised, because "the RFOA test,

Given that every other subsection of Section 1625.7 makes no distinction between disparate treatment and disparate impact, the presence of such a distinction in subsections (d) and (e) underscores that it was made intentionally and must be given effect. In short, Section 1625.7(e) is a disparate-treatment regulation and has no application to disparate-impact cases.[11]

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rather than the business-necessity test, is the appropriate standard" for disparate-impact claims. 73 Fed. Reg. at 16,808; *see* U.S. Br. 16 n.1. It is therefore unsurprising that petitioners resort to stretching Section 1625.7's disparate-treatment provision beyond its terms.

[11] Petitioners' reading of Section 1625.7(e) is also at odds with the rule's history. As originally proposed, it could have been read to apply to *all* ADEA cases without distinction: "(e) The burden of proof in establishing that the differentiation was based on factors other than age is upon the employer." Proposed Interpretations, 44 Fed. Reg. 68,858, 68,861 (Nov. 30, 1979). Prior to adoption, however, the EEOC revised the rule to clarify that it applies only to disparate treatment:

> Paragraph (e) of § 1625.7 has been modified to clarify its initial intent that when the defense of "a reasonable factor other than age" is raised against *an individual claim of discriminatory treatment*, the employer bears the burden of showing that the "reasonable factor other than age" exists factually. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

46 Fed. Reg. at 47,725 (emphasis added). Importantly, the *Loeb* decision cited in the EEOC's explanation was a disparate-treatment case. 600 F.2d at 1008-12.

Although petitioners note that the initial RFOA rule enacted by the DOL did not expressly state that it applied only to disparate-treatment claims (Pet. Br. 38-39; U.S. Br. 15), that fact is unsurprising given that the regulation predated this Court's recognition of disparate impact in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In any event, the scope of a predecessor regulation cannot

Similarly, petitioners' view that Section 1625.7(e) imposes a burden of persuasion is inconsistent with the rule's text and history. The rule provides that an employer bears the burden merely of "*showing* that the 'reasonable factor other than age' *exists factually*." (emphasis added). These terms are best read as imposing on employers a burden only of production. The EEOC's proposed changes, which would replace the word "showing" with "proving," support this interpretation of the existing rule. 73 Fed. Reg. at 16,809. So does the history of Section 1625.7(e). As discussed in note 11, *supra*, the EEOC pointed to *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), in explaining why it was revising the DOL's regulation. 46 Fed. Reg. at 47,725. And in *Loeb*—a disparate treatment case—the First Circuit held that defendants have only a burden of production on RFOA, not a burden of persuasion. 600 F.2d at 1008-12.

Petitioners contend that, even if the text of Section 1625.7(e) appears to apply only to disparate-treatment claims, the Court should nevertheless defer to the EEOC's *interpretation* that the rule also applies to disparate-impact claims. Pet. Br. 39-40 & n.25; U.S. Br. 17-18. But an agency's interpretation of its own regulation merits deference only when not "plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *see Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). As explained above, the language limiting Section 1625.7(e) to disparate-treatment claims is

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change the EEOC's contemporaneous explanation of Section 1625.7(e), quoted above.

unambiguous, and *Auer* deference is therefore inappropriate.[12] Were the Court to hold otherwise, it would permit the EEOC, via amicus brief, to extend Section 1625.7(e) to disparate-impact claims in order to fill the gap left by *Smith*'s invalidation of Section 1625.7(d), the *actual* disparate-impact provision. Such deference would unduly "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588.

b. At most, the EEOC's regulation and interpretations are entitled to Skidmore deference

Even if the Court does defer to the EEOC's interpretation of Section 1625.7(e), the Court must then decide whether the *substance* of the rule itself warrants deference. At most, the rule here is entitled respect under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), and under that standard, the EEOC's position fails to persuade.

As the EEOC has indicated, Section 1625.7 merely contains "interpretative rules or statements of policy." 46 Fed. Reg. at 47,724; *see also Smith*, 544 U.S. at 263-64 (O'Connor, J., concurring in the judgment) (referring to Section 1625.7 as "an [EEOC] policy statement construing the RFOA provision" and as an "interpretative rule or policy statement"). Indeed, the EEOC structured Part 1625 to distinguish the rules that embody "Interpretations" (Subpart A) from those that consti-

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[12] Similarly, because the rule's text—especially when read in light of the rule's history—imposes merely a burden of production on employers and not one of persuasion, the EEOC is not entitled to *Auer* deference on that issue.

tute "Substantive Regulations" (Subpart B). *See* 29 C.F.R. Part 1625.

Unlike substantive (or "legislative") rules, interpretative rules lack "the force and effect of law." *See Shalala* v. *Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995); *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977). As such a rule, Section 1625.7 does not warrant *Chevron* deference. *See United States* v. *Mead*, 533 U.S. 218, 232 (2001); *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991); *Batterton*, 432 U.S. at 425 n.9.[11] Thus, if the EEOC's interpretive rule is entitled to any deference at all, it is at most the "respect" accorded under *Skidmore*. *See Christensen*, 529 U.S. at 587.

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[11] *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339 (2007), is not to the contrary. There the Court determined that a DOL rule, though labeled an "Interpretation[]," was in reality a "binding application of [the DOL's] rulemaking authority" under the FLSA. 127 S. Ct. at 2349-50. In doing so, however, the Court emphasized that the rule, which effectively increased the scope of an FLSA exemption covering certain companionship workers, "directly govern[ed] the conduct of the public" and "affect[ed] individual rights and obligations." *Id.* at 2350 (citations and internal quotation marks omitted). The interpretive rule at issue here, however, does not purport to govern employers' day-to-day conduct or create duties in any way pertinent to the EEOC's administration of the ADEA. At most, the rule is directed to the governance of judicial proceedings, a matter well outside the agency's sphere of expertise or gap-filling authority. *Cf. id.* at 2350 (ultimate question is whether Congress would have intended and expected courts to treat agency rule as an exercise of delegated gap-filling authority). Moreover, the fact that the EEOC has repealed some interpretive rules and reenacted them as "legislative" rules suggests that the agency recognizes its interpretations do not have the force and effect of law. *See* 60 Fed. Reg. 51,762 (Oct. 3, 1995) (seeking comment on proposal for "rescinding the existing interpretation" of apprenticeship programs in Subpart A and "issuing a legislative rule" concerning such programs in Subpart B).

Petitioners insist that the EEOC's interpretive rule deserves deference as a reasonable interpretation of ambiguous ADEA language, *see EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 115 (1988), and one consistently held by the DOL and EEOC since shortly after the ADEA's passage, *see EEOC* v. *Assoc. Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). As discussed above, however, the DOL and EEOC have *not* consistently interpreted the rule as applying to disparate-impact claims or imposing a burden of persuasion.[14] Moreover, unlike the instant case, both *Commercial Office Products* and *Associated Dry Goods* involved statutory provisions governing pre-litigation EEOC proceedings.[15] Those rules concerned "technical issue[s] of agency procedure," as to which the agency had unique expertise. *See Commercial Office Prods.*, 486 U.S. at 125 (O'Connor, J., concurring in part and concurring in the judgment). The same is true of *Federal Express Corp.* v. *Holowecki*, 128 S. Ct. 1147, 1154-60 (2008), which concerned whether submission of certain documents to the EEOC constituted a "charge of

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[14] Even if 29 C.F.R. § 1625.7 could be deemed consistent with the original DOL regulation, *see supra* note 11, *Smith* clarifies that the interpretation set forth in subsection (d) was consistently wrong. There is good reason then, to view the remainder of the RFOA provision, including subsection (e), with a critical eye.

[15] *See Commercial Office Prods.*, 486 U.S. at 110-16 (addressing whether state agency waiver of 60-day processing period under worksharing agreement with EEOC "terminat[ed]" proceedings within meaning of Title VII so that EEOC could deem charge filed); *Assoc. Dry Goods*, 449 U.S. at 593-604 (addressing whether EEOC's prelitigation disclosure of confidential information to employee was a "public" disclosure violating Title VII).

discrimination" triggering the agency's conciliation and enforcement mechanisms.

By contrast, the EEOC interpretation at issue here does not implicate the agency's interest in administering its own proceedings. Rather, Section 1625.7(e) purports to allocate the RFOA burden of proof in *judicial* proceedings, a subject traditionally entrusted to the expertise of the courts. *Cf. Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649-50 (1990). Indeed, the case against deference here is particularly strong because, through its own rule, the EEOC has assigned to itself a lesser burden of proof for those cases in which it is a litigant. If such administrative encroachment merits any deference at all, again it should at most be the respect accorded under *Skidmore*.

Under *Skidmore*, the question is whether Section 1625.7(e) has "the power to persuade." *See Christensen*, 529 U.S. at 587; *Martin*, 499 U.S. at 157; *Skidmore*, 323 U.S. at 140. The better reading of the ADEA's text, its purpose, and this Court's precedents is that the burden of proof on RFOA should be borne by plaintiffs in disparate-impact cases. To the extent Section 1625.7(e) suggests otherwise, it should be given no weight.

4. The Equal Pay Act is not analogous

Petitioners contend that the Equal Pay Act ("EPA"), as construed in *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), supports deeming RFOA an affirmative defense. *Corning* held that the employer bears the burden of persuasion with respect to the EPA's "any other factor other than sex" provision, 29 U.S.C. § 206(d)(1). *See* 417 U.S. at 196.

Asserting that the EPA and the ADEA are "similarly-structured" and "serve[] the same basic purpose" (Pet. Br. 27), petitioners state that "[l]ike the ADEA, the EPA begins with a general prohibition against workplace discrimination," and then "establishes a series of exceptions to the general rule," (Pet. Br. 25). But petitioners gloss over significant textual differences between the two provisions and fail to take account of their very different functions.

The EPA provision that defines a "violation," *County of Washington* v. *Gunther*, 452 U.S. 188, 196 (1981), provides that no employer

> shall discriminate ... between employees on the basis of sex by paying wages to employees ... at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex ... for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

29 U.S.C. § 206(d)(1).

As the Court explained in *Corning*, "to make out a case under the [EPA]," an employee must establish not only "that an employer pays different wages to employees of opposite sexes," but also that the wages are paid " 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.' " 417 U.S. at 195 (quoting 29 U.S.C. § 206(d)(1)). If a plaintiff meets these requirements, "the burden shifts to the employer to show that the differential is justified under one of the [EPA]'s four exceptions." *Id.* at 196. This framework makes sense, because it is only after the employee has demonstrated the existence of a

wage differential between the sexes that cannot be explained by typical market factors—such as skill, responsibility, or working conditions—that the employer is asked to account for the discrepancy. *Cf. Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) ("[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.").

The EPA is far from a disparate-impact statute.[16] The burden of persuasion shifts to the employer to justify its practices only once the employee has proven disparate treatment of the sexes in a particularly compelling manner. As with the BFOQ provision of the ADEA, therefore, the fact that the employer has the burden of persuasion on certain defenses under the EPA is of little persuasive force in this case.

5. Petitioners misconstrue the legislative history of the OWBPA

Petitioners contend that the legislative history of the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) ("OWBPA"), reflects congressional approval of an EEOC interpretation placing the RFOA burden of persuasion on employers, and shows that Congress understood the "otherwise prohibited" language of Section 623(f)(1) to signify an affirmative defense. In passing the OWBPA, however,

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[16] *See County of Washington*, 452 U.S. at 170 (noting that the "any other factor other than sex" clause acts to "confine the application of the [EPA] to wage differentials attributable to sex discrimination"); *Smith*, 544 U.S. at 239 n.11 (plurality opinion) (explaining that the clause bars disparate-impact claims).

Congress considered and rejected proposals that would have expressly allocated the RFOA burden of proof to employers.

The OWBPA responded to this Court's decision in *Betts*, which adopted a broad construction of the ADEA's employee-benefit plan provision in Section 623(f)(2), and determined that employees bear the burden of proving that it does not apply. *See* 492 U.S. at 180-81; OWBPA § 101, 104 Stat. 978. In the OWBPA, Congress narrowed the Section 623(f)(2) provision and expressly placed the burden of proving its applicability on employers. *Id.* § 103(1), 104 Stat. 978-79 (employer "ha[s] the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act.").

Although the OWBPA did not amend Section 623(f)(1) to place the burden of persuasion under that provision on employers, earlier bills would have done so. *See* S. 1511, 101st Cong. § 103 (1989); H.R. 3200, 101st Cong. § 4 (1989). It was these versions that were analyzed in the legislative reports cited by petitioners, who concede that the Senate *deleted* the proposed amendment to Section 623(f)(1) from the final enacted version. Even so, they argue, the OWBPA's addition of "otherwise prohibited" to Section 623(f)(2) shows that Congress understood that language to signify an affirmative defense and thereby ratified an EEOC interpretation deeming RFOA an affirmative defense. But the legislative history indicates otherwise.

Petitioners point to language in legislative reports stating that "otherwise prohibited" in Section 623(f)(1) was commonly understood to signify an affirmative defense, and endorsing a perceived EEOC position that the employer bears the burden of proving RFOA. But

petitioners ignore the comments of other committee members, who warned that allocating the RFOA burden to employers would go beyond merely reversing *Betts*—which had not addressed Section 623(f)(1)—and would effect a change of pre-*Betts* law in five circuits. *See* S. Rep. No. 101-263, at 58 (1990); H.R. Rep. No. 101-664, at 82-83 (1990). Those legislators explained that "allocating the [Section 623(f)(1)] burden of proof in a manner that is *not* consistent with the way courts historically have allocated the respective burdens" would overreach the OWBPA's objective, namely, "return[ing] to the state of law prior to the *Betts* decision." H.R. Rep. No. 101-664, at 82 (emphasis added); *see id.* at 83 (bill would rewrite RFOA burden of proof rules under "guise of reinstating the prior law"); S. Rep. No. 101-263, at 58 (proposed placement of RFOA burden on employers was contrary to bill's purported purpose of "simply restor[ing] the original intent of the ADEA").[17]

Eventually, Senator Metzenbaum (co-sponsor of the original S. 1511), joined by Senator Hatch, introduced a compromise version that deleted the proposed amendment to Section 623(f)(1). *See* 136 Cong. Rec. S13,594 (daily ed. Sept. 24, 1990). The final statement of the Senate managers explained the deletion:

> [We] are not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-*Betts* law. *Prior to* Betts, *courts had allocated the burden of proof under paragraph 4(f)(1).* This bill overturns the Supreme Court's allocation of the burden of

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[17] Senators Hatch and Grassley reiterated these concerns during the Senate debates. *See* 136 Cong. Rec. S13,247 (daily ed. Sept. 17, 1990); S13,298 (daily ed. Sept. 18, 1990).

> proof under paragraph 4(f)(2). Because the allocation of the burden of proof under paragraph 4(f)(1) was not at issue in *Betts*, the managers find no need to address it in this bill.

136 Cong. Rec. S13,596-13,597 (daily ed. Sept. 24, 1990) (emphasis added). Contrary to petitioners' claim, then, the deletion of Section 623(f)(1) from S. 1511 was not the product of a congressional desire to ratify the EEOC's interpretation of Section 623(f)(1); nor was it a determination that the phrase "otherwise prohibited" sufficed to establish an affirmative defense. Rather, the deletion reflected a legislative agreement not to interfere with court decisions allocating the burden of proof under Section 623(f)(1).

The government suggests that Section 623(f)(1) was deleted from S. 1511 as "superfluous," because the "otherwise prohibited" language already in that section allocated the burden of proof to employers. This argument fails both to account for the legislative history described above and "to give effect, if possible, to every clause and word of [the] statute." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). In amending Section 623(f)(2), Congress added *both* "otherwise prohibited" language *and* the statement: "An employer ... shall have the burden of proving that such actions are lawful." OWBPA § 103(1), 104 Stat. 978-79. But if the language "otherwise prohibited" sufficed in itself to allocate the burden, then the express burden of proof language in Section 623(f)(2) would have been unnecessary.

In any event, how Congress may have viewed Section 623(f)(1) when it amended Section 623(f)(2) is of no import, for "the interpretation given by one Congress ... to an earlier statute is of little assistance in discerning the meaning of that statute." *Betts*, 492 U.S. at 168;

see also United States v. *Price*, 361 US. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). Thus, the OWBPA's legislative history cannot determine the burden of proof applicable to a preexisting provision like Section 623(f)(1).

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The Second Circuit properly imposed on petitioners the burden of proving that the challenged employment action was not based on reasonable factors other than age. Because petitioners do not contend that they can carry that burden, the judgment should be affirmed.

II. The Judgment Below Should Be Affirmed Even If The Employer Bears The Burden Of Persuasion On Reasonableness

Even if the Court concludes that respondents bear the burden of persuasion on RFOA, it nonetheless should affirm. The evidence in the record establishes, as a matter of law, that respondents' RIF determinations were based on reasonable non-age factors. And even if this Court concludes that *Wards Cove* provides the framework for ADEA disparate-impact claims, it should affirm on the separate ground that petitioners failed to carry their burdens under that framework.

A. Respondents Have Established RFOA As A Matter Of Law

In *Smith*, this Court explained that an employer need not choose the best way to achieve its business objectives so long as it chooses a reasonable one.[18] Un-

[18] 544 U.S. at 243 ("Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its

der that standard, respondents are entitled to judgment as a matter of law even if they bear the burden of persuasion on reasonable factors other than age. Given respondents' proof at trial, no reasonable juror could conclude that the four factors used in KAPL's RIF are unreasonable bases for termination decisions generally. And even if KAPL conceivably could have done more to cabin its managers' flexibility and criticality determinations, no reasonable juror could conclude that reliance on those factors was unreasonable given the training managers received and the review to which their determinations were subjected. *Cf. Smith*, 544 U.S. at 243 ("While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable.").

KAPL introduced unrebutted evidence that performance, company service, flexibility, and criticality are reasonable factors to use in making termination decisions. Senior managers explained that KAPL decided to use those factors after considering the practices of numerous other companies that had performed similar layoffs. Tr. 340, 1337, 1347-48, 4089. KAPL's expert, Frank Landy, a "specialist in industrial psychology with substantial corporate downsizing experience," Pet. App. 16a, testified that the four criteria "form the core of most reasonable and effective systems" and added, "I haven't seen any systems for making personnel decisions in the last couple decades that have not included those four things." Tr. 4092-96. Petitioners did not even cross-examine Landy. Tr. 4116.

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goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.").

KAPL also demonstrated that flexibility and criticality were particularly appropriate factors given the circumstances that precipitated the RIF. Because of the changing nature of the laboratory's work and the government's mandate that KAPL perform more work with fewer people, employees' flexibility to perform tasks outside their existing roles was imperative. J.A. 121, 126-27; Tr. 1023-24, 1403-04. Criticality was likewise key because KAPL needed to retain those employees who possessed unique knowledge and skills essential to the laboratory's ongoing work. Tr. 1023-24, 1134-35, 1404-05; J.A. 102-03.

Although the factors of criticality and flexibility necessarily involve some individualized judgments, KAPL introduced unrefuted evidence that it cabined its managers' discretion to avoid any danger that these criteria might be used in an arbitrary manner. KAPL provided extensive training to managers involved in the RIF process and supplied them with clear written guidelines on how to apply the RIF criteria. Tr. 984-85, 1002-04, 1023-24, 1410-15, 2732-33, 4090-91; J.A. 117-22. Landy testified that the "training programs that KAPL had developed and delivered for this were really very, very good .... [They were] as good, if not better than any others I had seen for accomplishing the same goal." Tr. 4090-91. He further explained that the criticality and flexibility determinations were "guided" judgments. Tr. 4099-4100 ("People knew what they were rating, they knew what the numbers meant and they were evaluating based on their knowledge of the capabilities of the people they were rating."). Several witnesses testified that the Review Board then rigorously reviewed managers' decisions concerning all aspects of the RIF, including determinations of criticality and flexibility. Tr. 487-88, 832-33, 1008-09, 1024, 1293, 1410,

1459-60, 2825, 3197, 3374-75, 3715-18, 4127, 4138; J.A. 97, 115-16. Petitioners' own expert acknowledged that the Review Board "reviewed each of these decisions to make sure that the central management at KAPL agreed with the decision that the lower managers made." Tr. 1876.

Petitioners failed to counter respondents' evidence of the reasonableness of the RIF criteria and "did not directly challenge the testimony of KAPL principals regarding the planning and execution of the [RIF]." Pet. App. 18a. In fact, the *only* affirmative support in the record for petitioners' position before this Court that "respondents' unaudited reliance on subjective decisionmaking during an involuntary reduction in force had a substantial and unnecessary negative impact on the employment rights of older workers" (Pet. Br. 18)—a position they advocated neither at trial nor on appeal in *Meacham I*—is a single, speculative answer given by their expert, Dr. Janice Madden.[19] *See* Tr. 1927-28. On cross, she hypothesized that "the system set up for the evaluation did not offer adequate protections to keep the prejudices of managers from influencing the outcome." *Id.* But she never explained that statement; it appeared to be based solely on the fact that older employees were statistically more likely to be affected by the RIF. *See* Tr. 1928. Madden never

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[19] As discussed in the Statement, the theory petitioners tried to the jury—over respondents' objections—was that KAPL's use of an involuntary layoff *in itself* violated the ADEA. Because petitioners contended that KAPL should have instituted a hiring freeze or expanded the Voluntary Separation Plan *instead of* performing the RIF, their testimony did not focus on the reasonableness of the RIF factors or KAPL's review of those factors' application.

testified that petitioners' scores were incorrect or the result of age-based prejudices; rather, she explained that she assumed productivity was equally distributed between older and younger workers, and under that assumption concluded that the results of the RIF could not be explained by chance. Tr. 1905, 1912-17, 1928, 1950-51. Importantly, Madden also failed to explain what additional protections KAPL could have implemented that would have reduced the disparate impact on older employees.

Even under the exacting standard for review of jury verdicts, petitioners' evidence was insufficient as a matter of law to rebut respondents' voluminous evidence that KAPL employed reasonable criteria to guide the RIF and implemented those criteria in a reasonable manner. Moreover, as KAPL's expert explained, numerous major employers routinely use downsizing procedures very similar to those employed in the RIF. Tr. 4092-96. To hold that those procedures are unreasonable would unwisely constrain employers' efforts to reduce their workforces while retaining vital employees and would put considerable pressure on employers to use quotas or give preferential treatment to older employees. *Cf. Wards Cove*, 490 U.S. at 652 (rejecting construction of disparate-impact test that would encourage employers to adopt racial quotas).

As this Court recognized in *Smith*, there often is a correlation between a person's age and ability to perform a given job, and thus "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." 544 U.S. at 240-41. The evidence presented at trial demonstrates that this is just such a case. Indeed, given that the JMOL standard "mirrors" the standard for summary judgment, *see Anderson* v. *Liberty Lobby, Inc.*,

477 U.S. 242, 250 (1986), this case is no different from *Smith*, where this Court affirmed summary judgment on the ground that the non-age factors considered by the employer were reasonable as a matter of law. 544 U.S. at 231-32, 242-43. Here, respondents based their decision on reasonable factors other than age, and they too are therefore entitled to judgment as a matter of law—regardless of who bears the burden of proof.[20]

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[20] Petitioners contend that this Court should not reach the question of what evidence was presented because, although respondents "did plead the RFOA provision in their answer," they "forfeited" their right to assert it by failing to ask for a corresponding jury instruction or to object to the instructions that were given. Pet. Br. 52. That is wrong. At trial, both the parties and the district court labored under a misconception as to the scope of RFOA. At the time, an EEOC rule stated that the RFOA provision required a showing of "business necessity," 29 C.F.R. 1625.7(d), and the Second Circuit applied an unadulterated *Wards Cove* analysis to ADEA disparate-impact claims, *Smith* v. *Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999). However, *Smith* v. *City of Jackson* made clear that the RFOA inquiry focuses on "reasonableness." 544 U.S. at 243. The district court's failure to instruct the jury on RFOA was thus plain error affecting substantial rights, and may be corrected by this Court. *See Johnson* v. *United States*, 520 U.S. 461, 468 (1997) ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration"); *United States* v. *Olano*, 507 U.S. 725, 733 (1993) ("failure to make the timely assertion of a right" "does not extinguish an 'error' "); Fed. R. Civ. P. 51(d)(2) ("A court may consider a plain error in the instructions that has not been preserved ... if the error affects substantial rights.").

Indeed, in light of the history of this case and the evolving state of the law, it would be appropriate for the Court to forego plain-error analysis and apply plenary review. *Cf. City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120-21 (1988) (applying plenary review where the "legal landscape['s] ... contours are in a state of evolving definition and uncertainty"); *City of Newport* v. *Fact*

B. Respondents Are Entitled To Judgment As A Matter Of Law Under The *Wards Cove* Framework

This Court should also affirm because respondents are entitled to judgment under *Wards Cove* alone. In concluding otherwise in its initial decision, the Second Circuit affirmed judgment for petitioners on a theory that the jury never heard, that petitioners never pressed, and that is not supported by the evidence.

At trial, petitioners' disparate-impact theory was that the RIF as a whole, and not merely certain aspects of the RIF, had an adverse impact on older employees. Further, petitioners contended that because KAPL could serve its business objectives without resorting to involuntary layoffs, the ADEA required it to adopt one of two alternatives to the RIF: "(1) opening the VSP to the entire workforce except those with critical skills and (2) a hiring freeze." Pet. App. 44a; *see supra* Statement. In summation, petitioners' counsel set forth their theory in simple terms: "I don't think that the defendants needed to do this layoff." Tr. 4634; *see also* Tr. 4635; JMOL Opp. 20-21.

This argument failed to satisfy steps one and three of *Wards Cove*. Thus, the Second Circuit properly rejected petitioners' approach, concluding that "[e]mployers are free to decide that layoffs are necessary." Pet. App. 60a. Upon reaching this conclusion, the court should have vacated the judgment for petitioners, because the jury's verdict rested on an erroneous theory

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Concerts, Inc., 453 U.S. 247, 256-57 (1981) (refusing to "limit[] ... review to a restrictive 'plain error' standard" where "the contours of municipal liability under § 1983[] ... are currently in a state of evolving definition and uncertainty.... The very novelty of the legal issue at stake counsels unconstricted review.").

of liability. Instead, and without being invited to do so by petitioners—who continued to defend the verdict solely on their theory at trial, *see* Plaintiffs-Appellees' *Meacham I* Br. 35-36—the Second Circuit proceeded to conclude:

> At least one suitable alternative is clear from the record: KAPL could have designed [a RIF] with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias.

Pet. App. 60a. The Second Circuit thus upheld the jury's verdict on a theory the jury never heard. This was error. *Cf. McCormick* v. *United States*, 500 U.S. 257, 270 n.8 (1991) ("Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury."). Moreover, because the alternative rationale came from the Second Circuit and not the parties, the briefs had not addressed the record evidence regarding KAPL's oversight and review processes. Without guidance as to the key testimony brought out in a five-week trial, the court missed extensive evidence of planning, training, and oversight that went into the RIF. *See supra* Statement & Part II.A.1. Thus, even leaving aside RFOA, petitioners did not carry their burden under *Wards Cove*.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

MARGARET A. CLEMENS
JOHN E. HIGGINS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, N.Y. 14603
(585) 263-1000

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
HEATHER M. ZACHARY
ANTHONY M. DEARDURFF
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 663-6000

JANET R. CARTER
DANIEL C. RICHENTHAL
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, N.Y. 10022
(212) 230-8800

APRIL 2008

APPENDICES

STATUTORY AND REGULATORY APPENDIX

AGE DISCRIMINATION IN EMPLOYMENT ACT

The Age Discrimination in Employment Act, 29 U.S.C. § 623, provides in relevant part:

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an

employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment

made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

* * *

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII, 42 U.S.C. § 2000e-2, provides in relevant part:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining

programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and

the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession au-

thorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

• • •

EQUAL PAY ACT

The Equal Pay Act, 29 U.S.C. § 206(d), provides:

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — AGE DISCRIMINATION IN EMPLOYMENT ACT REGULATIONS

Section 1625.7 of Title 29 of the Code of Federal Regulations provides:

(a) Section 4(f)(1) of the Act provides that

* * * it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * *.

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at Part 1607 of this Title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the bur-

den of showing that the "reasonable factor other than age" exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f) (2) exception to the Act.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NOTICE OF PROPOSED RULEMAKING
29 CFR PART 1625

Volume 73 Federal Register 16,807, 16,809 (Mar. 31, 2008) provides in relevant part:

For the reasons set forth in the preamble, the Equal Employment Opportunity Commission proposes to amend 29 CFR chapter XIV part 1625 as follows:

PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

* * *

Subpart A–Interpretations

2. Revise paragraphs (d) and (e) of § 1625.7 to read as follows:

§ 1625.7 Differentiations based on reasonable factors other than age.

* * *

(d) Any employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age." An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that is allegedly responsible for any observed statistical disparities.

(e) Whenever the exception of "a reasonable factor other than age" is raised, the employer bears the burden of proving that the "reasonable factor other than age" exists factually.

* * *